IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY, THE TWENTY FIFTH DAY OF APRIL
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE C.Y.SOMAYAJULU

WRIT PETITION NO : 19020 of 2004 and 2673 of 2005

W.P.No.19020 of 2004

Between:

Smt. Yaseen Khatoon W/o Ahmed Hussain, R/o 5-7-524, Nampally Dargah, Hyderabad.

..... PETITIONER

AND

1.The Commissioner, Municipal Corporation of Hyderabad, Hyderabad.

2.Aziz Khan S/o Sulfeqar Khan, 50 yrs, H.No.5-7-523, Nampally Dargah, Yousufain Road, Hyderabad.

(R-2 is impleaded as per Court Order dated 03-03-2005 in W.P.M.P.No.5288 of 2005)

.....RESPONDENT

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue Writ, order or direction particularly in the nature of Writ of Mandamus declaring the proceedings No.56/86 dated 4-10-2004 and the proceedings No.Lr.No.F/107/TPS/HO/2004-362 dated 1/2-07-2004 of the respondent is arbitrary, illegal and total non-application of mind and to quash or set a side the same and to issue a consequential direction to the respondent to not to interfere with the construction of the petitioner as per sanctioned plan and to pass.

(Prayer is amended as per Court order dated 29.12.2004 in WPMP.No.3229 of 2004)

Counsel for the Petitioner: MR.A.RAJENDRA BABU

Counsel for the Respondent No.1: MR.RAMA RAO GHANTA

Counsel for the Respondent No.2: Mr. V.M.M.Chary

W.P.No.2673 of 2005:

Between:

Aziz Khan, s/o Sulfeqar Khan, R/o H.No.5-7-523, Nampally Dargah, Yousufain Road, Hyderabad.

..... PETITIONER

AND

1 The Municipal Corporation of Hyderabad, Rep. by its Commissioner, Lower Tank Bund, Hyderabad.
2 The Assistant Commissioner, Municipal Corporation of Hyderabad, Circle No.4, Khairatabad, Hyderabad.
3 Smt. Yaseen Khatoon,. W/o Ahmed Hussain, R/o 5-7-524, Nampally Dargah, Yousufain Road, Hyderabad.

.....RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ , order or direction, one more particularly in the nature of a writ of "Mandamus" declaring the action of the 1st and 2nd respondents in not discharging their duties under the Hyderabad Municipal Corporation Act, 1955 and in not pursuing any diligent action or taking steps for the demolition of unauthorized constructions being made by the 3rd respondent in premises bearing municipal No.5-7-524 situated at Nampally Dargah, Yousufain road, Hyderabad as being illegal, arbitrary, unconstitutional and contrary to the provisions of Hyderabad Municipal Corporation Act, 1955, and the Rules and By-laws made thereunder, and consequently direct the 1st and 2nd respondents to forthwith initiate diligent and effective steps for discharging their statutory duties and take appropriate action for demolishing the entire illegal construction made by the 3rd respondent in the said premises and pass such other order or orders as the Hon'ble Court may deem fit and proper in the circumstances of the case.

Counsel for the Petitioner: MR.V.M.M.CHARY

Counsel for the Respondent Nos.1&2: MR.RAMA RAO GHANTA

Counsel for the Respondent No.3: A. Rajendra Babu

The Court made the following:

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THE HON'BLE SRI JUSTICE C.Y.SOMAYAJULU

WRIT PETITION No.19020 of 2004 and 2673 of 2005

COMMON ORDER:

Since these writ petitions are interconnected they are being disposed of by a common order. For the sake of convenience parties would hereinafter be referred to as they are arrayed in W.P.No.19020 of 2004.

2. Owner of the premises bearing H.No.5-7-523/24-1&2 at Nampalli Dargah initially filed W.P.No.19020 of 2004 questioning the proceedings No.56/86 dated 04-10-2004 of the Commissioner, Municipal Corporation of Hyderabad (first respondent), issued under Section 636 of the Hyderabad Municipal Corporation Act, 1955 (the Act), to remove the constructions made by her, and later amended the prayer as one to set aside the proceedings dated
1/2-07-2004 of the first respondent in Lr.No.F/O/97/TPSHO/ 2004-2362. Petitioner in W.P.No.2673 of 2005 got himself impleaded as 2nd respondent in that writ petition subsequently.

3. The case of the petitioner is that she, after complying with the necessary formalities, applied for construction of a commercial complex in her premises bearing H.No.5-7-523/24-1&2 and was accorded permission by the first respondent vide permit No.158/15740 dated 20-07-1998 for construction of ground, 1st and 2nd floors and so she constructed the building as per the plan. Thereafter, on 20-1-2004

she sought permission for construction of 3rd and 4th floors after paying the prescribed fee. As she did not get any communication from the first respondent either granting or refusing permission within the prescribed time, she, after issuing a notice to the first respondent, commenced construction on 12.05.2004 as per the plan submitted by her. On 22-06-04, first respondent issued a notice under Section 461 of the Act asking her to stop the construction being carried on by her for which she sent a reply on 26-06-2004. But, on 20-09-2004, first respondent issued notice to her under Section 452 of the Act to explain why action under Section 452(2) of the Act cannot be taken for her unauthorized laying of slab for 2nd and 3rd floors over the existing ground and 1st floors, in violation of G.O.Ms.No.423 M.A., dated 11-07-1998 and for her violating Sections 428 and 433 of the Act, for which she sent a reply on 24-09-2004 explaining the reasons and intimating that she did not violate the sanctioned plan or the Rules and Regulations.

4. The case of the first respondent is that petitioner who got regularized the building consisting of ground plus two floors vide permit No.158 dated 20-7-1998, had on 20-01-2004 submitted an application with plan for construction of 3rd and 4th floors, without paying necessary fees. Since all the staff concerned were busy with General Elections and election duties, immediate action could not be taken on the said application of the petitioner. Significantly, petitioner did not send the fees even with the notice dated 12-05-2004, sent by her. Since total area of the plot of the petitioner is 180 Sq. meters only, height of the building cannot exceed 10 meters as per G.O.Ms.No.423 M.A. dated 31-7-1998 and so petitioner is not at liberty to proceed with construction of structures above 10 meters from the ground level. For availing the benefit of section 437 of the Act, plan submitted by the petitioner should be in accordance with the building byelaws and Regulations and zonal regulations in force and should also comply with all the formalities. Since the petitioner did not pay the fees and since construction of 3rd and 4th floors is not permissible in the site belonging to the petitioner, petitioner is not entitled to the protection claimed by her under Section 437 of the Act and so notice under Section 461 of the Act was given to her on 22-6-2004 to stop construction and later notice under Section 452 of the Act, to show cause why the unauthorized construction made cannot be removed was given to the petitioner.

5. The contention of the second respondent, who filed W.P.No.2673 of 2005 questioning the construction being made by the petitioner, is that, since petitioner

started construction of the 3rd floor without any proper sanction, after having constructed the ground plus two floors on 9" x 12" size pillars, without maintaining open space as per municipal regulations, and got the deviations made by her regularized under G.O.Ms.No.419, and since the 2nd floor of the building of the petitioner is beyond the permissible height, she has no right to construct any additional floor on her existing building. In view of the size of the pillars over which she made the construction there is every likelihood of the building being collapsing due to over load, and thus there is an imminent danger to him and his building just adjacent to the building of the petitioner and so he filed W.P.No.2673 of 2005 seeking demolition of the illegal constructions being made by the petitioner.

6. The main contention of the learned counsel for the petitioner is that since petitioner had already constructed ground plus two floors and sought sanction for construction of third and fourth floors, the allegation in the notice issued by the first respondent to the petitioner that petitioner is laying slab for 2nd and 3rd floors, over and above the existing floors, establishes that the said notices were issued mechanically, without application of mind, and hence are liable to be set aside. He relied on **G.V.NARASIMHA REDDY v. COMMISSIONER, NIRMAL MUNICIPALITY** where it is held that if the Commissioner of Municipality, while ordering demolition has to exercise his discretion on just and reasonable grounds, but not arbitrarily or capriciously, contended that since the impugned notices were issued mechanically without proper application of mind by the first respondent, they are liable to be set aside. It is his contention that petitioner came to know that the application submitted by her for construction of 3rd and 4th floors was rejected only through the order dated 1/2-07-2004 which is beyond 30 days, and so, in view of Section 437 of the Act, petitioner proceeding with the construction as per the plan is not a violation of the provisions of the Act. It is his contention that since first respondent is the authority competent to determine the amount of fees payable on the application for construction of new structures did not determine the fees payable, petitioner could not pay the fee payable, and in any event since in **M/S. AMRUTHA ESTATES PRIVATE LIMITED v. STATE OF A.P.** it is held that non-payment of fees with the revised application, which has to be determined by the sanctioning authority, per se cannot be a ground for rejection of the application for construction,

the notices impugned are liable to be quashed. It is also his contention that since second respondent has no locus standi to file a writ petition questioning the constructions being made by the petitioner writ petition filed by the second respondent is liable to be dismissed. He also contended that since the property bearing

H.No.1-2-597/22, Domalguda, at lower tank bund road, belonging to the husband of the petitioner was taken over for construction of fly over by the Special Deputy Collector, intimating that petitioner can approach Chief City Planner, Municipal Corporation of Hyderabad, by filing necessary application, for permission or relaxation of the Rules for construction of 3rd and 4th floors, petitioner in any event can proceed with the construction of the 3rd and 4th floors. Relying on **FRIENDS COLONY DEVELOPMENT COMMITTEE v. STATE OF ORISSA** he contended that since municipality has power to regularize deviations and unauthorized constructions, by receiving compounding fees, minor deviations if any of the petitioner can be ordered to be compounded, as petitioner is prepared to pay the compounding fees.

7. The contention of the learned standing counsel for the first respondent is that since the area of the site over which the building of the petitioner is standing is only 180 Sq. meters, the height of the building to be constructed therein cannot exceed 10 meters, and so even when the permission sought by the petitioner was not granted or refused within 30 days from the date of submission of the application, petitioner cannot proceed with the construction applied for, as the same is against to the byelaws and the building rules and zoning regulations. It is his contention that the property bearing Door No.1-2-597/22 A&B at lower tank bund, was in the name of the husband of the petitioner but not in the name of the petitioner, and was acquired for construction of a fly over, under the Land Acquisition Act, 1894, by paying compensation for the land and structures, as the husband of the petitioner was not willing to handover the area required for road widening free of cost, and in fact husband of the petitioner, dissatisfied with the compensation awarded by the Land Acquisition Officer, sought reference under Section 18 of the Land Acquisition Act and contends that since additional FSI would be given only to the persons who hand over the required area for road widening etc. free of cost, but not to those who receive compensation, neither the petitioner nor her husband are entitled to the

benefit of additional FSI, nor are they entitled to protection under Section 437 of the Act. It is his contention that payment of fee is mandatory for processing an application for construction and since petitioner admittedly did not pay the prescribed fees there is no valid application for construction of 3rd and 4th floors by the petitioner.

8. The contention of the learned counsel for the second respondent who is the petitioner in W.P.No.2673 of 2005 is that in view of ratio in **3ACES v. MUNICIPAL CORPORATION OF HYDERABAD** construction, under deemed sanction, cannot be made in contravention of the provisions of the Act and building Rules and Regulations and so the fact that first respondent did not respond to the application of the petitioner for construction of two additional floors which ex facie is contrary to building rules, within 30 days, would not clothe the petitioner with a right to proceed with the construction of the additional floors exceeding 10 metres in height. It is his contention that when the unauthorized constructions are being carried on by a person, his neighbour can protect his interest by filing a writ petition and relied on **SARADA BAI v. SHAKUNTALA BAI** in support of his contention and contended that since petitioner is making constructions of a tall building over 10 metres height on pillars of the size of 9" x 12", structural safety of that building mostly being used for commercial purpose, is doubtful as it may not withstand the load and may crumble at any time, and so second respondent, a neighbour of petitioner, has a right to question the constructions being made in violation of the provisions of the Act and building Rules and Regulations.

9. During the course of hearing of these petitions, since it is contended that petitioner, in violation of the orders of status quo passed by this Court, is proceeding with the construction, a Commission was appointed to find out if the petitioner is proceeding with the construction, and to note the features existing at the building, if necessary by taking photographs. The learned Commissioner inspected the premises after giving notice to both sides and filed his report along with photographs. His report shows that in the ground floor of the premises of the petitioner there is a closed shutter on the northern side, and the remaining portion of the ground floor, with glass fittings, is being used as Reception of 'Hussaini Lodge'

and the remaining portion of the ground floor and the entire 1st floor is being used as a Lodging house and the second floor is being used by the petitioner for her residence, and that material like sand and bricks were found in a corner of the 2nd floor, and that the ground plus two floors are of old constructions, except the front portion of the 2nd floor, where a parapet wall on the eastern side i.e. towards main road, was constructed and that the rooms in the 3rd floor are in a semi finished stage and 24 pillars raised for construction of 4th floor are still in an unfinished stage and that no construction work was going on from about a week prior to the date of his inspection.

10. The fact that the petitioner sought for and obtained permission for construction of ground plus two floors is not denied or disputed. The specific case of the petitioner is that after submitting an application for construction of 3rd and 4th floors on 20-01-2004, she started construction work from 12-05-2004, after giving intimation to the first respondent, when she did not receive any communication either approving or rejecting her application. It is to be noted that petitioner filed the office copy of the letter dated 24-11-2003, addressed by her husband to the Chief City Planner, Town Planning Section, in which, he stated that his wife (petitioner) is having a house at Dargah and is running a lodge therein since a long time, and that he wants to construct two more floors thereon to expand the business of the lodge and since his property, at lower tank bund, was acquired for construction of a fly over, he was advised to approach him (City Planner) for permission to proceed with the construction, by relaxation of the rules, and so permission for construction of 3rd and 4th floors by relaxing the Rules may be granted. Since petitioner filed that document, she must be imputed with knowledge of the contents therein. So, it is clear that petitioner and her husband, acting on her behalf, are fully aware of the fact that construction of 3rd and 4th floors of the building can be made only by obtaining relaxation of the building Rules. Hence, it is clear that petitioner is aware that construction of 3rd and 4th floors on her building without relaxation would be irregular. As rightly contended by the learned standing counsel for the first respondent and the learned counsel for the second respondent, construction, under the deemed provision, can be proceeded with only if it is in accordance with the building rules and regulations, but not if it is in violation of the building rules and

regulations. So, when the petitioner submitted a building plan, which is contrary to the building rules and regulations, for approval, even if first respondent did not pass orders thereon, petitioner cannot proceed with construction of such building under the deemed permission clause as per the ratio in **3ACES** case (4 supra). So, petitioner cannot say that first respondent has no right to order demolition of the illegal constructions being made by her.

11. The contention of the learned counsel for petitioner that in view of the fact that the property of the husband, at lower tank bund, was acquired, petitioner is entitled to extra FSI and can proceed with the construction of 3rd and 4th floors, as per G.O.Ms.No.15 M.A. & U.D. dated 15.01.1998, cannot be accepted because it is not the case of the petitioner that her husband gave the property belonging to him, for construction of a fly over, free of cost. It is the specific case of the first respondent that the property of the husband of the petitioner was acquired under the Land Acquisition Act and compensation was paid to him and that he being dissatisfied with the compensation awarded had sought a reference to the Civil Court. The additional FSI as per G.O.Ms.No.15 M.A. & U.D. dated 15.1.1998 would be available only to persons who part with their property free of cost for road widening programme and so petitioner cannot claim that benefit.

12. In the affidavit filed in support of the writ petition, petitioner alleged that the application for permission to make the construction was submitted after paying the prescribed fees, 1st respondent disputed that fact and clearly stated that no fees was paid by the petitioner. During course of arguments, the learned counsel for petitioner admitted that petitioner did not pay the fees, and relied on **M/S.AMRUTHA ESTATES PRIVATE LIMITED** case (3 supra) in support of his contention that payment of fees is not a condition precedent for processing the application. In my considered opinion, that decision has no application to the facts of this case. In that case, after payment of requisite fees, Municipal Corporation granted Permit No.92/46 on 29-12-1985, to the petitioner therein to construct a commercial complex-cellar, ground floor and three floors, subject to the conditions imposed. In order to comply with the third condition therein petitioner therein approached the Hyderabad Urban Development Authority (HUDA) with a written request, to which a

reply was sent by the HUDA on 12-01-1987 informing him that he should approach the Municipal Corporation. When he approached the Municipal Corporation, they did not give any written reply. According to the petitioner therein, he was orally informed by the Municipal authorities that it was the responsibility of the HUDA to approve the elevation treatment and so he issued a reminder on
04-02-1987 to the Municipal Corporation, and that it did not respond. Subsequently, on 12-03-1987, petitioner therein submitted an application, along with revised plans. They were returned by the Municipal Corporation on 10-04-1987 on the ground that requisite fees was not paid, as envisaged under 3.4 and 5.1 of the M.C.H. Building Byelaws of 1981. While submitting the revised plan on 12-03-1987, the petitioner therein specifically stated that necessary permit fee and other fees were already paid at the time of grant of permit and that if any fee still is to be paid, as per the revised proposals, the same would be paid after hearing from the Corporation. To that letter the Municipal Corporation sent a reply on 10-04-1987 informing him, that as he did not pay the permit fee as envisaged under 3.4 and 5.1 of the building byelaws his application cannot be considered. While considering that letter the learned Judge observed-

> "Bye-law 3.2 speaks of an obligation to submit an application in writing in the prescribed form which may be obtained from the Corporation on payment of prescribed fee.
> Bye-law 3.4 says that no application referred to in bye-law-3.2 shall be valid unless and until the person giving the application has paid fees to the authority. Bye-law 5-1 says that no application for building permit shall be deemed valid unless and until the person giving notice has paid fee as per bye-law No.5-2. The scales of fees for building permit shall be as decided by the Authority. As the petitioner has re-submitted the revised plans, bye-law Nos.3.4 and 5.1 have no application. The correct bye-law that is applicable is bye-law No.5.2(c) which says, that in respect of the revised plans, resubmitted within a period of six months, no permit fee shall be chargeable." (underlining mine)

So, it is clear that that is a case of resubmission of a plan in respect of which fees was already paid. In this case, the petitioner, admittedly, did not pay the fees. Payment of fees is a pre-requisite for considering a building application. When no fee is paid the application would be an invalid application. For that reason also the petitioner has no right to proceed with construction of a building.

13. G.V.NARASIMHA REDDY case (1 supra) relied on by the learned counsel for the petitioner has no application to the facts of this case. What is held in that case is

that the Commissioner of Municipality, while ordering demolition of unauthorized structure, cannot exercise his discretion in an arbitrary and capricious manner. Order for demolition of third and fourth floors, being constructed by the petitioner in violation of the provisions of the building Rules and Byelaws etc., cannot be said to be an arbitrary or capricious decision.

14. I am unable to agree with the contention of the learned counsel for the petitioner that in view of the observations in **FRIENDS COLONY DEVELOPMENT COMMITTEE** case (2 supra) a direction can be issued to the first respondent to regularize the constructions being made by the petitioner as she is not a professional builder and is only a housewife. As stated earlier, husband of the petitioner sought relaxation of the rules, for construction of two additional floors for the business of running a lodge. So, it is clear that the intention is to use the building for a commercial purpose but not for residential purpose. That apart, neither the Government nor first respondent has authority to regularize the constructions which are contrary to the provisions of the building byelaws and the regulations. The jurisdiction of this Court can be invoked to enforce but not to violate law and so no direction from this Court, which, if given runs contrary or violates any law or rule in force can be sought. Therefore, no direction can be given to the first respondent to regularize the unauthorized constructions being carried out by the petitioner in contravention of the building byelaws and regulations.

15. The contention of the learned counsel for the petitioner that second respondent has no locus standi to file W.P.No.2673 of 2005 or contest this petition has no force because he, admittedly, is her neighbour. When a building, contrary to the building laws, is being constructed, a neighbour cannot be expected to close his eyes. He has every right to object to such constructions, as every citizen has a right to complain of breach of building rules and regulations, as unauthorized constructions are a bane and are in the nature of public nuisance and so first respondent issuing the notices impugned cannot be said to be arbitrary or illegal, and so, I find no merits in W.P.No.19020 of 2004.

16. Hence, W.P.No.19020 of 2004 is dismissed and the W.P.No.2673 of 2005 is

allowed. The structures in the building being constructed by the petitioner in W.P.No.19020 of 2004 contrary to the provisions of the Act and the building Rules and Regulations, shall be removed by the Municipal Corporation of Hyderabad as per the procedure prescribed. No costs.

(C.Y.Somayajulu, J.)

Date: 25-04-2005

Cvrk

Note: LR copy to be marked.

That Rule Nisi has been made absolute as above.

Witness the Hon'ble Sri Devinder Gupta, the Chief Justice on this Monday, The Twenty Fifth Day Of April Two Thousand And Five.

..... REGISTRAR

One Fair Copy to the Honourable Mr Justice C.Y.Somayajulu (For His Lordships kind perusal)

To

1 The Commissioner, Municipal Corporation of Hyderabad, Lower Tank Bund Road, Hyderabad.

2 The Assistant Commissioner, Municipal Corporation of Hyderabad, Circle No.4, Khairatabad, Hyderabad.

3. 8 LR Copies.

4. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.

5. The Secretary, A.P.Advocates Association Library, High Court Buildings, Hyderabad.

6. 2 CD copies.

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